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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No.

DENNIS E. KONIECKI, BARRY M. TEFKA, ROSEMARY ELLEN WELLS, DAVID FREDERICK, and JOHN J. RUSNIAK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 29, 1974.

ORDER BELOW

The order of the Court of Appeals is not reported pursuant to Rule 28, Rules of the United States Court of Appeals for the Seventh Circuit, and appears in the Appendix at 1a, *infra*. No opinion was rendered by the United States District Court for the Northern District of Illinois.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 29, 1974. Petitions for rehearing, plus suggestions of rehearing *en banc*, were denied on September 6, 1974. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether the republication of the schedules of controlled substances on May 12, 1972, complied with the republication provisions of 21 U.S.C. §812(a) and, if not, whether such non-compliance rendered the schedules inoperative during the period covered by this indictment.

2. Whether a conviction may be affirmed upon a theory substantially different from that upon which the jury was instructed.

3. Whether the evidence was sufficient to support the conviction of petitioner Wells of conspiracy.

4. Whether the evidence was sufficient to support the conviction of petitioner Rusniak of conspiracy.

STATUTE INVOLVED

21 U.S.C. §812(a)

"There are established five shedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. *The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.*" [Emphasis supplied]

STATEMENT OF THE CASE

A. The Proceedings Below

The petitioners were jointly indicted in the United States District Court for the Northern District of Illinois for a conspiracy to import marihuana into the United States from Mexico in violation of 21 U.S.C. §963. Following a jury trial, all of the petitioners were convicted. The following sentences were imposed: Koniecki, five years imprisonment; Tefka and Rusniak, four years imprisonment; Frederick, three years imprisonment; Wells, three years suspended sentence, probation three years, first six months thereof to be served in a jail-type institution. The United States Court of Appeals for the Seventh Circuit affirmed the convictions on July 29, 1974.

B. Testimony of the Government Chemist

Mr. Robert R. Bozeman testified that he was a chemist employed by the United States Customs Service and had performed certain tests upon government exhibit 100. In his cross-examination, he testsified as follows:

> Q. Did you make a test to determine the hallucinogenic properties within that exhibit, sir?
> A. No, sir, other than the fact that I did identify it as marihuana Cannabis Sativa. (T. 493-494)[1]

C. Charge to the Jury

In discussing the elements of the offense, the Court charged the jury as follows:

> "Title 21, United States Code Section 952(a) provides in pertinent part, in substance as follows: 'It

[1] Throughout this petition, references to the trial transcript will be indicated as T1, T2, etc.

shall be unlawful to import into the United States from anyplace outside thereof any control [sic] substance.'

"And Title 21, US Code, Section 812(c) provides: 'As a matter of law, any material, compound, mixture or preparation which contain any quantity of marihuana is a Schedule I control [sic] substance.' And you are hereby advised that marihuana is a nonnarcotic control [sic] substance.

"The term marihuana means 'All parts of the plant Cannabis Sativa L., whether growing or not, seized [sic] thereof, resin extracted from any part of such plant, and every compound, manufacture, salt, derivative or mixture in preparation of such plant, seeds or resin. Such term does not include the mature stalks of such plant, fiber, fiber produced from such stalk, oil or cake made from the seeds of such plant and any other compound, manufacture, sale, [sic] derivative, mixture, preparation of such mature stalks, except the resin extracted therefrom, fiber, oil or cake or the fiber oil [sic] or seed of such plant that is incapable of germination.'

"'Marihuana as defined in Section 8215 [sic], Title 21, U.S.C., is a control [sic] substance, unless specifically excepted if it contains any material, compound, mixture or preparation *which contains hallucinogenic substances* or which contains any of their salts, isomers and salts of isomers whenever the existence of such salts, isomers and salts of isomers is possible within the specific chemical designation.'

"If the Government has not proved beyond a reasonable doubt that the substance in question is included in the definition that I have read, you should find the defendant not guilty." (T. 837-839) (Emphasis supplied)

D. Closing Argument

Defense counsel in summation argued as follows:

"The Judge will also tell you that Congress passed another part of the law about marihuana, this unusual substance. He will tell you that if the substance contains any material — I'm sorry; the Judge will tell you that marihuana is a controlled substance, unless, it is specifically excepted, if it contains any material, compound, mixture or preparation which contains hallucinogenic substances or which contains any of their salts, isomers and salts of isomers whenever the existence of such salts, isomers and salts of isomers is possible within this specific chemical definition.

"Now I don't want you to think that I was trying to confuse you when I was cross-examining Mr. Bozeman. The definitions in the statute required me to cross-examine him.

"He said with respect to my questions about its having hallucinogenic properties, that is, properties which cause, if a person uses this, smokes it, I suppose, causes hallucinations. He never made one test to make that determination. (T. 773)

* * *

"It is a two-aspect case. I don't want you to think that I was being merely frivolous or that I was being an obstructionist when I was cross-examining the chemist. The statute required me to, the same statutes that say to you, if, in the totality of this case, if there is in your mind a reasonable doubt in this case about the evidence with respect to the guilt of Tefka or the existence of marihuana according to the statute, it is your duty to acquit. We call upon you to discharge that duty." (T. 774-775)

E. Evidence Against Wells

The evidence relied on by the United States Court of Appeals for the Seventh Circuit in affirming Wells' conviction for conspiracy was as follows:

> "She was present on numerous occasions during the critical planning and coordinating phases of the conspiracy in United States and Mexico. She and Tefka met twice in Chicago and she drove the car in Chicago in an evasive design to avoid any trailing cars." Appendix at 7a.

Wells was Tefka's girlfriend. She was "along for the ride." The only proof against her was that she associated with Tefka.

The only act claimed to have been committed by Wells was that she drove a car in Chicago "in an erratic manner." (T. 510) No evidence was adduced that she was aware of what was being discussed by the other occupants in the car. She took directions from Tefka as to the route. (T. 170-172) No evidence was adduced that she participated in any conversation.

F. Evidence Against Rusniak

Examination of the evidence introduced of petitioner Rusniak's own acts and declarations reveals that in August, 1971, Rusniak was present when Frederick, who knew Price, asked Price whether he would be interested in flying a load of marihuana from Jamaica into Florida. (T. 45) On January 27, 1972, Rusniak met Price at the airport in Chicago and drove him to Rusniak's apartment. (T. 49) At the apartment Rusniak introduced Price to Koniecki and Tefka, and then Price only had a conversation with Tefka and Koniecki. Koniecki suggested to price that they fly marihuana into the country from Mexi-

co. (T. 53) The next day Rusniak, Tefka, Koniecki and Price met at a coffee shop in Chicago. Rusniak sat by as Koniecki stated to Price that he had a supply of marihuana in Mexico and that it could be flown out into Florida. (T. 55) On February 10, 1972 in Fort Myers, Florida at Frederick's house, Price met with Frederick and Rusniak. Frederick told Price that he (Frederick) would look for an aircraft and would finalize a lease on the aircraft and suggested different airports that could be used in the Florida area. (T. 57) In the opinion below, the summary of the evidence incorrectly states that: "Rusniak was to find a suitable air strip in Florida" and that he was aided in the search for the air strip by the other four alleged co-conspirators. Appendix at 1a. There is nothing in the evidence to indicate that Rusniak did anything to obtain an air strip in Florida. None of Rusniak's acts or declarations indicate any participation in the importation of marihuana or that he had any stake or financial interest in the profits of such an importation. This is the total evidence of acts and declarations of Rusniak presented by the Government.

REASONS FOR GRANTING THE WRIT

I. The ruling below affirms convictions for a marihuana importation conspiracy which allegedly existed during a period when marihuana was not a controlled substance.

In affirming these convictions, the United States Court of Appeals for the Seventh Circuit has decided an important question of federal statutory law which has not been settled by this Court, nor by any Court of Appeals.

Section 812(a), Title 21, United States Code, established five schedules of controlled substances. The section was included in the Comprehensive Drug Abuse Prevention and Control Act of 1970 which was enacted on October 27, 1970. 21 U.S.C. §§801-966.

Section 812(a) provides in pertinent part:

> "The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter."

Petitioners construed this language as requiring updating and republication of the schedules on October 27, 1971, one year after the date of the enactment of the subchapter. The first republication of the schedules occurred on May 12, 1972. 37 Fed. Reg. 9545. Thus, petitioners asserted that there was no schedule of controlled substances in effect from October 27, 1971 to May 12, 1972, a period encompassing the duration of the conspiracy.

The Seventh Circuit construed the above-included language not to require republication until April 27, 1972,[2] and held that during the alleged conspiracy "there was a valid publication in effect rendering conspiracy to import marihuana from Mexico to the United States a crime." Appendix at 3a. The Court of Appeals sug-

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[2] "Therefore, the first republication was due on April 27, 1972. . . ." *United States v. Nocar*, — F. 2d —, Nos. 73-1703, 73-1704 (7th Cir., May 31, 1974), Appendix at 3a. The Court of Appeals in the instant case held that *Nocar* "controls our decision here. . . ." Appendix at 3a.

gested that petitioners' construction of Section 812(a) would require a statute which read:

> "The schedules established by this section shall be updated and republished one year after the date of the enactment of this subchapter and every six months thereafter for two years." *Nocar,* Appendix at 14a.

Petitioners respectfully suggest that the Court of Appeals' construction of the language would require a statute which read:

> "The schedules established by this section shall be updated and republished eighteen months after the date of the enactment of this subchapter and every six months thereafter for eighteen months."

Both of these proposed statutes are clear; in this respect they differ from the one enacted by Congress.

Where language in a penal statute is so ambiguous that more than one construction is possible without doing violence to its words, punctuation or syntax, courts must attempt to discern the intent of the drafters and then apply the "policy of lenity." *Ladner v. United States,* 358 U.S. 169, 177 (1958). Petitioners assert that an examination of the Controlled Substances Act, 21 U.S.C. §801 *et seq.,* makes clear that Congress intended its legislation to remain current with scientific knowledge related to controlled substances and drug abuse. See, *e.g.,* 21 U.S.C. §§801(1); 811(a)(1); 811(c); 812(b)(1)-(5). Petitioners' construction of §812(a) achieves this objective to a greater extent than does that of the Court of Appeals.

The policy of lenity requires that any doubts concerning the applicability of a criminal statute must be resolved in favor of the defendant. *United States v. Bass,*

404 U.S. 336, 348 (1971); See also *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Bell v. United States*, 349 U.S. 81 (1955); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952). Section 812 (a) is clearly a penal statute; the construction of the Court of Appeals resolves the ambiguities against petitioners and is thus in conflict with prior decisions of this Court.

Assuming this Court agrees with petitioners' construction of §812(a) that republication of the controlled substances schedules was required by October 27, 1971, then no valid schedule of controlled substances was in effect during the period of the conspiracy.

> "[T]he Administrative Procedure Act and the Federal Register Act must be read as a part of every Congressional delegation of authority, unless specifically excepted. Those Acts require publication, irrespective of actual notice, as a prerequisite to the issuance of a regulation making certain acts criminal. If notice of a proposed rule is not published in the Federal Register at least thirty days prior to its issuance, or if good cause is not found and published for the immediate issuance of a rule, the rule cannot be legally issued; if the rule itself is not published, it follows that it has not been issued; and if a rule has not been issued, it has no force as law." *Hotch v. United States*, 212 F. 2d 280, 283-284 (9th Cir. 1954).

See also Borak v. Biddle, 141 F. 2d 278 (D.C. Cir. 1944); *United States v. Louisville & N.R. Co.*, 165 F. 936, 939-941 (W. D. Ky. 1908).

A conspiracy to import a controlled substance is not an indictable offense if at the time of the conspiracy there are no controlled substances.

II. Petitioners' convictions were affirmed upon a theory of guilt different from that set forth in the trial court's instructions and argued by defense counsel in summation; had the appellate court analyzed the evidence underlying the elements of the offense as charged by the trial court, is would have found the evidence insufficient as a matter of law.

During cross-examination of the government chemist, defense counsel established that no tests had been performed upon the marihuana (government exhibit 100) to determine its hallucinogenic properties. In the instructions conference defense counsel explained that he had asked questions concerning tests for hallucinogenic properties because the statute required proof of such properties as an element of the offense. (T. 652-656) Petitioners tendered an instruction which interpreted 21 U.S.C. §812 (c) as requiring proof that the exhibit contained a quantity of a hallucinogenic substance. (Defendant Tefka's proposed instruction no. 2) The Court informed counsel that it would submit this instruction. (T. 656) Defense counsel argued in summation that no tests had been performed to determine whether exhibit 100 had hallucinogenic properties (T. 773-775), and the Court submitted the instruction on hallucinogenic properties. (T. 838-839)

After conviction, petitioners filed post-conviction motions in which it was asserted that there was no proof whatsoever that the exhibit contained substances with halucinogenic properties.

The Seventh Circuit held that, since this was a conspiracy prosecution, the government was not required to

prove the identity of the substance imported nor required to prove that such substance had hallucinogenic properties. See Appendix at 4a. On this theory these convictions were affirmed.

Petitioners assert that, regardless of the correctness of the judge's charge, such charge was the law of this case and the evidence must be analyzed in the light of this charge. In this prosecution the government was required by the Court's instructions to prove that exhibit 100 had hallucinogenic properties. Its proof failed and petitioners' post-verdict motion for acquittal should have been granted.

Appellate courts on several occasions have considered the impact of erroneous instructions which were more favorable to defendants than the correct instruction. In each instance, however, the government met the higher burden imposed by the improper charge. Petitioners have found only one case in which the government did not prove the erroneous element included by the Court's instruction. In that case the court reversed the conviction. In *Michaud v. United States,* 350 F. 2d 131 (10th Cir. 1965), the defendant was charged with making a telephone threat against the life of the President. The Court improperly instructed the jury that before a finding of guilt could be returned the jury must find that "the maker of such threats intended to carry them out himself." *Id.* at 133. The government conceded that there was no evidence in the record that the defendant intended to effectuate his threat against the President. *Id.* Apparently, the jury ignored the instruction, as in the instant case, and returned a verdict of guilt. In granting a new trial the Court stated:

> "Although conceding the instruction to be error, the government argues that there was no prejudice because the instruction was favorable to the defendant. Usually a defendant cannot claim prejudice from an incorrect instruction that is favorable to him. [citations omitted] But here the instruction was favorable to the defendant not in the sense of imposing a higher degree of proof but rather by inserting a false issue into the case. When a false issue of magnitude sufficient to nullify proper consideration of the issues is inserted into a case, the proper administration of justice is thwarted and a conviction so based cannot stand." *Id.* at 133-134.

In *United States v. Leggett,* 312 F. 2d 566, 573-574 (4th Cir. 1962), the Court held defendant was prejudiced when the Court's charge to the jury injected an erroneous issue. In that case, as in the case *sub judice,* the Court's instruction implied an element of the offense which had not been enacted by Congress.

Thus, the holding of the Seventh Circuit is inconsistent with the holdings of the Fourth and Tenth Circuit.

The lower Court holding is also in conflict with prior decisions of this Court. Since *Cole v. Arkansas,* 333 U.S. 196 (1948), it has been firmly established that:

> "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Id.* at 202.

Cf. Rabe v. Washington, 405 U. S. 313, 315 (1972); *Spevack v. Klein,* 385 U.S. 511, 518-519 (1967); *Bouie v. City of Columbia,* 378 U.S. 347 (1964).

The prejudice to petitioners is apparent. Since trial counsel was allowed to cross-examine the chemist on his

failure to test the substance for hallucinogenic properties, counsel could have reasonably concluded that such properties would be included as an element of the offense. The conference on instructions proved that his assumption was correct. On the basis of this assumption, the case was tried; some petitioners elected not to testify when it became apparent that there was total failure of proof on this element. Expert witnesses were not called to dispute the validity of the tests which identified the substance as marihuana. Closing argument identified the failure of proof as one of the two issues in the case. Had the trial court adopted the theory of the Seventh Circuit, the case would have been differently tried and petitioners can only speculate as to its outcome.

It is no answer that the law does not require proof of the identity of the imported substance in a conspiracy prosecution. While it may not be an element of the offense, it certainly is some evidence of the unlawful agreement. That is, if one imports marihuana pursuant to an agreement, evidence that the substance is marihuana is evidence of the scope and nature of the agreement.

III. The "mere association" of Wells with other members of the alleged conspiracy is not sufficient evidence to support her conviction for conspiracy.

This Court held in *Ingram v. United States,* 360 U.S. 672, 678 (1959), that an attempt to participate in a conspiracy may be inferred from knowledge of the conspiracy only where the evidence of such knowledge is clear and is not equivocal. The logic of *Ingram* was followed in *Diaz-Rosendo v. United States,* 364 F. 2d 941 (9th Cir. 1966), in which the Court of Appeals for the

Ninth Circuit reversed a conspiracy for smuggling marihuana and held that "guilt cannot be established by mere association." See also *United States v. Webb*, 359 F. 2d 558, 562 (6th Cir. 1966); *Panci v. United States*, 256 F. 2d 308, 312 (5th Cir. 1958).

Accordingly, the lower court decision is in conflict with prior decisions of this Court and is inconsistent with the holdings of other Courts of Appeals.

IV. Under *United States v. Falcone*, 311 U.S. 205 (1949), a conviction for conspiracy to import marihuana cannot be sustained where the only evidence against petitioner was that he introduced a willing buyer of marihuana to a willing seller.

Taking the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U. S. 60 (1942), the acts and declarations of Rusniak reveal that he introduced Price to Koniecki and Tefka knowing that Tefka, Koniecki and Price were interested in importing marihuana into the United States. In its opinion sustaining the conviction of petitioner Rusniak, the Court below also incorrectly believed that the evidence showed that "Rusniak was to find a suitable air strip in Florida." Appendix at 1a.

To uphold Rusniak's conviction of conspiracy merely on the evidence of an introduction of the other parties to the venture without any showing that he had a financial stake in the venture or in any way furthered the object of the conspiracy would be an "attempt to broaden the already pervasive and widesweeping nets of conspiracy prosecutions." *Grunewald v. United States*, 353 U.S. 391 at 404 (1957).

In *McDaniel v. United States,* 24 F. 2d 303, 305 (5th Cir. 1928), the defendant was charged with conspiring with certain other defendants to import and sell intoxicating liquors in violation of the National Prohibition Act. The Court stated:

> "His (McDaniel's) knowledge that others were in a conspiracy to violate the law and his full sympathy with and approval of the object of that conspiracy without more would not constitute him a conspirator..."

In *United States v. Falcone,* 311 U.S. 205 (1949), this Court held that a defendant who supplied sugar to other defendants who operated an illicit still was not a member of a conspiracy to distill illicit whiskey even though the supplier of the sugar knew that the sugar was to be used for the purpose of distilling whiskey. This Court so held in the *Falcone* case despite the fact that the sales of the sugar furthered the object of the conspiracy to which the buyers were parties. Petitioner Rusniak did not participate in any act which furthered the object of the conspiracy and thus is in even a stronger position to contest the conspiracy conviction than was the defendant in *Falcone.*

In *United States v. Hysohion,* 448 F. 2d 343 (2d Cir. 1971), the Court reversed the conviction of Rimbaud and held that the evidence as a matter of law did not support the conviction for conspiracy to deal in narcotics. The evidence as to Rimbaud was almost identical to that presented against Rusniak. The Court in *Hysohion* stated at 347:

> "We find no evidence in the record and nothing in the findings below which would support the existence of an unlawful agreement. The fact that Rimbaud told Everett, a willing buyer, how to make

contact with a willing seller does not necessarily imply that there was an agreement between the seller, who was Roupinian, and Rimbaud."

This Court as in *Ingram v. United States,* 360 U.S. 672 (1957) should again denounce the unbridled expansion of federal conspiracy jurisdiction.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Formal Parts Omitted)

Appellants have appealed from their conviction by a jury under a one count indictment charging conspiracy to import marijuana into the United States from Mexico in violation of 21 U.S.C. §§963 and 952(a). We affirm.

In January, 1972, Price, an airplane pilot and an unindicted conspirator, agreed with Fredrick, Koniecki, Tefka and Rusniak to fly a load of marijuana from Mexico to Florida. In February of 1972, he met with Rusniak and Fredrick and they discussed leasing a plane. Rusniak was to find a suitable airstrip in Florida, and Tefka, Fredrick, Price and Koniecki aided him in the search. Later, Tefka advanced Fredrick $2,500 to lease the aircraft.

Price and Koniecki rented an aircraft and, with Tefka and Rosemary Wells, flew to Houston, Texas, and then Guadalajara, Mexico. There the three men met with three John Doe co-defendants and set the time and place for the marijuana pickup.

Thereafter Price flew with Koniecki, with the marijuana, for Provo, Utah, but for want of fuel they were forced to land at Prescott, Arizona. They rented a car and transferred the marijuana from their plane to the car trunk. Koniecki was to drive the car to Flagstaff, Arizona, and Price was to fly the airplane back to Mexico. However, Price was arrested by United States Customs Agents in Banning, California. He disclosed the details

of the conspiracy and agreed to assist the agents in frustrating their object.

Price went to Chicago and was met there by Tefka and Wells. Wells drove Price and Tefka in her car through Chicago, under guidance from Tefka, so as to evade any cars which might be trailing them. A few days later, Price met with Tefka, Koniecki[1] and Wells with respect to his fee. Koniecki paid him $8,210. Fredrick later told Price he felt that he and Rusniak had not received their share of the money. Price gave Fredrick a check for $100. Thereafter, the defendants were arrested, and the indictment, trial, conviction and this appeal followed.

I.

All appellants raise the following issues: (1) did the failure of the Attorney General to timely update or republish schedules of controlled substances, as required by 21 U.S.C. §812(a),[2] vitiate appellants' conviction for conspiracy—between January 25 and April 13, 1972—to import the marijuana, and (2) even if timely was the republication by the Director of the Bureau of Narcotic Drugs, instead of by the Attorney General, a valid basis for the conviction.

---

[1] The marijuana had been left by Koniecki at a friend's ranch in New Mexico. It had been transported by parties unknown from there to Chicago some time during the period April 2 to April 12, 1972.

[2] 21 U.S.C. §812(a) provides, in pertinent part:

There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. *The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.* (Emphasis supplied.)

Both issues were decided in this court's recent *United States v. Nocar and Pendergast,* (7th Cir., slip op. Nos. 73-1703, 73-1704, decided May 31, 1974), and that decision controls our decision here adversely to appellants.

In *Nocar* the court rejected the contention that marijuana was not a controlled substance during the period of the indictment — January 7-8, 1972. The argument there was that the original publication was for only one year beginning October 27, 1970, to October 27, 1971, and that the full republication of April 20, 1971, and a republication of May 12, 1972, *nunc pro tunc* as of April 27, 1972, were not made pursuant to the statute; and accordingly there was no valid schedule covering the period between October 1971 and May 1972. The court in *Nocar* held that no republication was required on October 27, 1971, and that that date was to be used to determine when, during the following two years, the "six-month demarcations are to fall."

Appellants misread the second sentence of §812(a) in assuming that the first republication was to be on October 27, 1971. In *Nocar* the court did not reach the amicus curiae contention that the *nunc pro tunc* republication of May 12, 1972 denied Nocar and Pendergast due process. The court stated that when the offenses there were allegedly committed, the government's obligation to republish had not yet "ripened." The same is true here. We hold that during the period of the indictment before us there was a valid publication in effect rendering conspiracy to import marijuana from Mexico to the United States a crime.

We follow *Nocar* in deciding that our holding disposes of appellants' contention that the failure of the Attorney General to make the republication invalidates

the republication. During the dates in the indictment the republication requirement under §812(a) had not yet ripened.

II.

We see no merit in appellants' contention that the trial court erred in denying their motion for a directed verdict of acquittal at the close of the government's case because there was no proof that the substance appellants transported from Mexico was marijuana, within the statutory definition.

The law is well settled that a conspiracy to commit an offense is different from the substantive offense which is the object of the conspiracy. *United States v. Rabinovich,* 238 U.S. 78 (1915). The proof that appellants intended to import the marijuana into this country for profit met the government's burden of proof of conspiracy and justified the ruling. It had no burden to prove that the substance was strictly within the statutory definition.[3] *Britton v. United States,* 60 F. 2d 772 (7th Cir. 1932).

In order to prove its case, the burden of the government was to prove that there was an agreement to commit the crime of importing marijuana into the United States. It is of no significance that the government's chemist was unable to testify whether the plant was male or female, whether any of the seeds were capable of germination, and whether the substance had hallucinogenic properties — a prerequisite for marijuana as a controlled substance under 21 U.S.C. §802(15). The

[3] Appellants' argument that they were prejudiced by the government's introduction of the marijuana evidence — because it need not have been introduced — is frivolous.

gist of the offense is the unlawful agreement. Accomplishment of the objective of a conspiracy need not be proved.[4] *United States v. Fellabaum,* 408 F. 2d 220, 223 (7th Cir. 1969), *cert. denied,* 396 U.S. 858.

III.

The government prosecutor in cross-examination asked Rusniak a series of questions beginning with "Isn't it a fact?" Rusniak answered in the negative. The prosecutor failed to overcome the negative answers by rebuttal evidence. All appellants contend that they were prejudiced and are entitled to a new trial.

We do not approve the prosecutor's conduct, but there was ample evidence from Price to rebut most of Rusniak's negative answers, and we need not therefore discuss the "tactic" further. Rusniak's motion at the close of the evidence was not timely or effective to challenge the cross-examination. The damage, if any, was done when the unchallenged questions were asked, and Rusniak did not request the court to inquire whether the prosecutor intended to rebut the negative answers. In our view of the record there is no basis for concluding that denial of the untimely motion for mistrial was reversible error. The Price testimony distinguishes cases relied upon by Rusniak.

IV.

Rusniak and Fredrick argue, without substance, that the record does not support their convictions because

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[4] The case of *United States v. One 1966 Chevrolet Sedan, etc.,* (D.C. Fla. slip opn. No. —, entered January 16, 1974), cited by appellants, is of no avail to them. That case did not involve a *conspiracy* to commit a crime.

the evidence fails to sustain the charge of a single conspiracy.

The scope of the agreement entered into by the conspirators determines whether single or multiple conspiracies exist. *United States v. Hutul*, 416 F. 2d 607 (7th Cir. 1969), *cert. denied, sub nom. Sacks v. United States*, 396 U.S. 1007 (1970). Here the agreement contemplated transportation of marijuana from Mexico to the United States. Even if the others planned to cut Rusniak and Fredrick out of the profits, the record is clear that the objective of the conspiracy remained unchanged.

A finding of a single conspiracy is not precluded because Rusniak and Fredrick did not participate in the later efforts of the others to reach the conspiratorial goal. *United States v. Varelli*, 407 F. 2d 735, 742 (1969). Where, as here, *any* conspirators engage in overt acts in furtherance of the scheme, the unlawful scheme continues until its object is accomplished. *United States v. Nowak*, 448 F. 2d 134 (7th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972); *United States v. Hickey*, 360 F. 2d 127, 141 (7th Cir. 1966), *cert. denied*, 385 U.S. 928.

Moreover, neither Rusniak nor Fredrick took affirmative action to defeat or disavow the conspiracy. On the contrary, Fredrick stated to Price, after the marijuana was smuggled, that he and Rusniak did not get a fair share of the profits. The trial court did not abuse its discretion in denying the motion of these defendants for severance.

V.

The evidence most favorable to the government supports a guilty verdict against Wells. *Glasser v. United*

States, 315 U.S. 60 (1942); *United States v. Kwitek,* 467 F. 2d 1222 (7th Cir. 1972), *cert. denied,* 409 U.S. 1079. She was present on numerous occasions during the critical planning and coordinating phases of the conspiracy in the United States and Mexico. She and Tefka met Price in Chicago and she drove the car in Chicago in an evasive design to avoid any trailing cars.

VI.

The trial judge, just prior to sentencing, asked Wells if she had anything to say in her behalf. She said, "No, just that I was unaware of any conspiracy that there might have been." The Court stated:

> Well, I had seriously considered giving you probation, but if you want to tell me that you knew nothing about this, why, I am going to change my mind right now.

He sentenced her to three years probation, with the first six months in custody. She claims, without merit, that she was improperly sentenced for maintaining her innocence.

A trial judge has wide discretion in determining the proper sentence. *United States v. Tucker,* 404 U.S. 443 (1972). We cannot review a sentence which does not exceed the maximum permitted, except upon showing of gross abuse. *United States v. Willard,* 445 F. 2d 814 (7th Cir. 1971); *United States v. Marlin,* 471 F. 2d 764 (7th Cir. 1972). Although the trial court's comment was unfortunate, we are not persuaded that the sentence was not within a permissible exercise of his discretion. *United States v. Lehman,* 468 F. 2d 93 (7th Cir. 1972).

AFFIRMED.

In The
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM, 1973 — SEPTEMBER SESSION, 1973

Nos. 73-1703, 73-1704
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOSEPH NOCAR and JOHN PENDERGAST,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72 CR 667

RICHARD W. McLAREN, *Judge.*

ARGUED NOVEMBER 27, 1973 — DECIDED MAY 31, 1974

Before CLARK, *Associate Justice,** PELL, *Circuit Judge,* and NOLAND, *District Judge.***

PELL, *Circuit Judge.* On the basis of the parties' stipulated testimony, the trial judge found Joseph Nocar and John Pendergast guilty of knowingly and intentionally possessing a quantity of marijuana (18,772 grams) with intent to distribute the same, 21 U.S.C. § 841(a)(1).[1]

* Associate Justice Tom C. Clark, United States Supreme Court, Retired, is sitting by designation.

** Judge James E. Noland of the Southern District of Indiana is sitting by designation.

[1] Subsection 841(a)(1), part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, provides:

> "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . ."

21 U.S.C. § 802(6) defines "controlled substance" as a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V, as established by sections 811 and 812.

Defendants raise three issues on this appeal: (1) whether the Attorney General failed to update and republish in the Federal Register the schedules of "controlled substances" as required by 21 U.S.C. § 812(a), and, if he did, whether that failure precluded the defendants' prosecutions for possession of marijuana;[2] (2) whether the court erred in denying the defendants' motion to suppress marijuana which had been seized in a warrantless search of an automobile; and (3) whether the evidence was sufficient to prove that defendants had knowingly possessed the drug with intent to distribute it.

The evidence to which the parties had stipulated consisted primarily of the testimony that Government witnesses had given at the hearing on the motion to suppress. In a memorandum opinion issued April 20, 1973, the district court denied the motion.

Customs agents Robert Smith and Thomas King provided the principal evidence for the Government. Smith testified that on January 7, 1972, he had received a telephone call from a reliable informant, who told him that two men and a woman driving a blue Toyota with a specified Texas license plate were in Chicago attempting to locate buyers for narcotics. The three persons supposedly were staying at a motel at a designated location on the north side of Chicago. After Smith verified that an automobile fitting the informant's description was at the motel, he and another agent maintained surveillance. From his post, Smith could see two men and a woman in the room to which the car's occupants had

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[2] On May 11, 1973, the district court denied defendants' motion to dismiss the indictment because of the Attorney General's supposed failure to comply with the republication provision of the Comprehensive Drug Abuse Prevention and Control Act.

been assigned. A check by another agent revealed that the Toyota was registered to a M. Guerra and that Carol Guerra, the owner's daughter, was under indictment in Texas. In appearance, the woman in the motel room corresponded with the description Smith received of Carol Guerra. The agents also learned that the automobile had recently been in Mexico.

Agent Smith next observed defendant Pendergast drive up to the motel, enter the trio's room, and engage in conversation with the group. The agents checked the registration on Pendergast's vehicle. They learned that the car was registered to Pendergast at a Carbondale, Illinois, address. "[O]ur St. Louis office . . . stated that Mr. Pendergast was known in that area as a dealer in marijuana." When the persons in the room left and went to a garage at the rear of 1203-5 North State Street, Government agents followed them. They saw the Toyota backed into the garage while the woman resembling Carol Guerra remained in the adjacent alley. Smith testified that the woman kept glancing up and down the alley and appeared, to Smith, to be acting as a lookout. After a brief period, the persons left the garage.

Later in the day, the agents returned with a search warrant to the garage but found no contraband.

The next day, Saturday, January 8th, customs agents placed the garage under surveillance. About 1:50 p.m., agents Smith and King saw Nocar and Pendergast walk down the alley behind State Street. Smith drove his automobile to the south end of the alley, where King got out and began walking north. King testified that as he walked past the garage, he saw the blue Toyota with Texas license plates backed up to the door of the garage,

its rear about a foot or two inside the building. The trunk of the car was open, and the garage door had been pulled down to the level of the trunk lid. A rug had been draped over the area between the open trunk lid and the body of the Toyota. King testified that the view provided by the angle formed by the garage door and the wall of the garage enabled him to look into the building as he passed. During the approximately fifteen seconds he was at this vantage point, King observed defendant Nocar remove some white bags from the trunk of the Toyota and hand them to Pendergast, who placed them in the back of the garage. After observing these actions, King continued walking until he was some yards north of the garage whereupon he turned and signaled to agent Smith.

On the signal, Smith drove up the alley and jumped from his automobile, shouting, "Federal officers." Smith entered the garage at the same time that King, with gun drawn, did. Meanwhile, one of the defendants had slammed shut the trunk of the Toyota. Several other agents then joined those in the garage. Smith testified that he asked Nocar to open the trunk, and that Nocar shrugged his shoulders and did so. Smith observed white plastic bags and vegetable material in the trunk. He also detected a strong odor of marijuana. He then told the defendants that they were under arrest and read them their rights under *Miranda v. Arizona,* 384 U.S. 436 (1966). A field test revealed the substance in the bags to be marijuana. By 2:15 p.m., the agents had searched the garage and had found two suitcases containing approximately 6000 grams of marijuana.

The defendants testified in their behalf at the suppression hearing. Their version of the search differed

somewhat from that of the agents. For example, they claimed that they did not hear the announcement "Federal officers" and that agent Smith demanded, rather than requested, that Nocar open the trunk.[3]

I.

Defendants' first contention rests on their interpretation of 21 U.S.C. § 812(a), which provides in pertinent part:

> "There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter."

Subchapter I of the Comprehensive Drug Abuse Prevention and Control Act of 1970 was enacted on October 27, 1970. Marijuana was listed in schedule I of the statute.

The defendants maintain that the schedules should have been first republished and updated on the initial anniversary date, October 27, 1971, and subsequently on April 27, 1972, six months later. There was no republication on October 27. The Director of the Bureau of Narcotics and Dangerous Drugs first expressly invoked sec-

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[3] In its memorandum opinion on the motion to suppress, the district court found that Nocar had not freely and voluntarily consented to the search of the trunk. "There was conflicting testimony . . . as to whether Nocar was asked to open the trunk or ordered to do so. It is clear that Agent King entered the garage with his gun drawn. It is not unreasonable to infer that Nocar believed that he was in custody even before he was told that he was under arrest. . . . [T]he Government failed to meet its burden of proof on its consent theory."

tion 812(a) and fully republished the schedules on May 12, 1972, 37 Fed. Reg. 9545 (1972):

> "The Comprehensive Drug Abuse Prevention and Control Act of 1970, in section 202(a) (21 U.S.C. 812(a)), requires that the schedules of controlled substances established by that Act be updated and republished on a semiannual basis during the 2-year period beginning 1 year after the effective date of that Act. The effective date of that Act was October 27, 1970. Pursuant to the mandate of section 202(a), therefore, the Director hereby orders the publication of the schedules of controlled substances as of April 27, 1972."

Actually, schedules had been published approximately a year earlier in the Federal Register but not apparently pursuant to the mandate of the Act. In 36 Fed. Reg. 4928 (March 13, 1971), the Director had published under the caption of "Notice of Proposed Rule Making" a comprehensive set of regulations implementing the Act. The regulations covered, *inter alia,* registration of manufacturers, labelling and packaging, quotas, records, and reports. Also included was Part 308, schedules of controlled substances established by the Act "as they are changed, updated, and republished from time to time . . . ."

In response to objections to and comments on the proposed regulations, various amendments were made and the regulations as revised were published in 36 Fed. Reg. 7776, on April 24, 1971. In the proposed regulations, code numbers were given to the various controlled substances. In the regulations as finally published the scope and function of the code numbers was defined. These numbers do not appear in the schedules of the Act.

We do not deem that the publication of the schedules in March and April of 1971 were either necessitated by or

were in compliance with the updating-republication requirement of the Act but were merely a part of the overall implementing regulations for the Act.

We disagree with the defendants' reading of section 812(a). The second sentence of the provision does not require republication on October 27, 1971. Rather, it directs that that date be used to determine when, during the following two years, the six-month demarcations are to fall. Therefore, the first republication was due on April 27, 1972, eighteen months after the enactment of the subchapter and one half year after the first anniversary.

The meaning that the defendants ascribe to the section would be supported, not by the provision as presently written, but by, for example, "The schedules established by this section shall be updated and republished one year after the date of the enactment of this subchapter and every six months thereafter for two years."

Amicus curiae contends that the May 12th republication, stated to be effective as of April 27, 1972, violates due process because of its retroactivity. We need not reach this issue, for the rights of these defendants obviously were not infringed. Their alleged violation of the drug laws occurred in January 1972, when, as we held above, the Government's obligation to republish the schedule in accordance with section 812(a) had not yet ripened. The non-publication cases upon which the defendants rely, *Hotch v. United States,* 212 F. 2d 280 (9th Cir. 1954), and *Borak v. Biddle,* 141 F. 2d 278 (D.C. Cir. 1944), are thus inapplicable.

In sum, in January 1972 there was a valid prohibition in force making unauthorized use of marijuana a crime.

The defendants also argue that even if there had been a timely republication it would not have been valid inasmuch as the Director of the Bureau of Narcotics and Dangerous Drugs caused the republication rather than the Attorney General, 21 U.S.C. § 811. This argument, of course, is disposed of by our holding that the republication requirement had not ripened as of the date of activities involved in the present case. However, we also note that in 28 U.S.C. § 510, Congress provided that the Attorney General may make such provisions as he considers appropriate to allow other officers, employees or agencies to perform any of his functions. 28 C.F.R. 0.100 subdelegates the functions of the Attorney General under the Comprehensive Drug Abuse Prevention and Control Act to the Director of the Bureau of Narcotics and Dangerous Drugs.

II.

The defendants claim that they do not quarrel with the holding in *Chambers v. Maroney*, 399 U.S. 42, 52 (1970), and *Carroll v. United States*, 267 U.S. 132, 149 (1925), upon which the trial court in part relied in denying the motion to suppress the marijuana seized from the automobile trunk. Their complaint is that the foundation of those cases, the existence of probable cause, was lacking in their case. The district court had concluded that "[t]he evidence clearly shows . . . that the agents had probable cause to believe that the Toyota contained contraband drugs."

As the defendants point out, the informer's tip, as recapitulated by agent Smith, did not describe the basis for the informer's assertion that the persons he mentioned were attempting to sell narcotics. However, we certainly cannot fault the agents for following up the

tip. It clearly was superior to casual rumor. The confidential source had previously given information to Government agents about illicit heroin and hashish traffic, which tips had resulted in four seizures and an unspecified number of arrests and convictions. The tip consisted in part of detailed information that was readily verifiable by independent means. The agents investigated these specifics, and from their own observations confirmed the existence of the persons, the automobile, and the motel registration. The reports stemming from the tracing of the blue Toyota and Pendergast's car further enhanced the tip's credibility. Next, the agents saw Carol Guerra acting suspiciously in the alley behind the State Street garage on January 7th.

Despite these corroborative indicia, the defendants contend that the fruitless search conducted on January 7th would have persuaded a reasonable person that the tip was probably inaccurate. The lack of contraband in the garage on Friday surely did not mandate the agents' abandoning their investigation. They had ample justification for keeping a watch on the garage the following day. During that surveillance, agent King saw defendant Nocar take white plastic bags from the Toyota's trunk and hand them to defendant Pendergast. Although King testified that he could not ascertain what substance was in the bags, we think it judicially cognizable that marijuana is often transported in bags. The covert garage activities smacked of the illegal activity customarily associated with drug transactions.

What agent King observed and the slamming of the trunk lid upon Smith's shout of "Federal officers" were the last needed corroboration of the informer's tip to create probable cause. *Carroll, supra* at 149, explains that

term as "a belief, reasonably rising out of circumstances known to the seizing officer, that an automobile . . . contains that which by law is subject to seizure and destruction," a definition applicable to the instant case, too. "[T]he facts and circumstances within [the agents'] knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched." *Id.* at 162. The evidence at the hearing was sufficient to meet the test the Supreme Court has stated in a related context: "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause . . . ." *Spinelli v. United States,* 393 U.S. 410, 419 (1959). The agents here had many more facts on which to rely than had the agents in *Henry v. United States,* 361 U.S. 98 (1969), which defendants cite. Contrast also *Coolidge v. New Hampshire,* 403 U.S. 443, 458-64 (1971).

Not only was there probable cause, but the search of the Toyota and the seizure of the marijuana were not "unreasonable." It was not practicable for the agents to try to obtain a search warrant before conducting the search. The defendants emphasize that the Federal Building was a mere mile and one half from the garage, but they minimize the difficulty of finding a magistrate on a Saturday afternoon without risking the loss of the possible contraband. The magistrate is present there on Saturdays only until noon. If the hunt for a magistrate and the warrant procedures had taken several hours, the defendants would now be arguing that the agents had violated their constitutional rights by preventing them from leaving the scene. Further, the Government would face a

similar challenge had Carol Guerra or the unidentified male in the motel room or another person come to remove the Toyota. See *Chambers v. Maroney, supra* at 52 ,where the Court explained that

> "[f]or constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."

III.

The defendants' final argument is that the Government failed to prove the statutory elements of possession and intent to distribute.

Agent King testified that when he walked by the garage on the afternoon of January 8th he saw defendant Nocar removing some white bags from the trunk of the blue Toyota and handing them to defendant Pendergast. He also observed Pendergast take the bags and move them to the rear of the garage. King then signaled to agent Smith, and the men moved in to make the seizure. This testimony shows that the defendants had actual possession of the marijuana. That one of the defendants slammed the trunk shut when he realized that the agents were near does not negate the defendants' exercise of dominion and control over the marijuana immediately prior to the arrest. Because of King's observations, the Government did not need to establish that the defendants owned or leased the garage or the automobile or the suitcases.

The defendants also maintain that the agents' observations and the quantity of the contraband recovered are the only evidence the Government adduced as to their intent to distribute or sell and that such evidence was insufficient to meet the statutory requirement. Direct evidence of a sale or of the dollar value of drugs is not essential. As courts have frequently pointed out, knowledge and intent must often be proven by circumstantial evidence. At least two circuits, the Fifth and the Eighth, have held that proof of possession of substantial amounts of controlled substances supports the inference that the possessor intended to distribute the drugs rather than retain them for personal use. In *United States v. Mather,* 465 F. 2d 1035 (5th Cir. 1972), *cert. denied,* 409 U.S. 1085 (1973), the defendant was carrying 197 grams of cocaine when he was arrested. In *United States v. Perry,* 480 F. 2d 147 (5th Cir. 1973), the defendant possessed 188 pounds of hashish, and in *United States v. Johnson,* 469 F. 2d 973, 977 (5th Cir. 1972), the amount was 133 pounds of marijuana. Citing *Mather,* the court in *United States v. Echols,* 477 F. 2d 37 (8th Cir. 1973), *cert. denied,* 414 U.S. 825, held that the possession of 199 grams of cocaine was sufficient to support an inference of intent to distribute. Here, defendants possessed 18,770 grams, approximately 40 pounds, of marijuana.

We agree with the Fifth and Eighth Circuits. *Cf. United States v. Ortiz,* 445 F. 2d 1100, 1104-1105 (10th Cir. 1971), *cert. denied,* 404 U.S. 993; *United States v. Cerrito,* 413 F. 2d 1270 (7th Cir. 1969), *cert. denied,* 396 U.S. 1004 (1970). It is consistent with House Report No. 91-1444, which accompanied H.R. 18583, the basis for the present Act: "The quantity of a drug found in the possession of a person, of course, bears upon the question

of whether or not his possession is for his own use, or is for the purpose of illicit transactions involving others, for which much more severe penalties are provided." 3 U.S. Code Cong. & Adm. News, 91st Cong., 2d Sess. (1970-71), at 4577.

We therefore affirm the judgments of conviction of Joseph Nocar and John Pendergast.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.